THE SUPREME JUDICIAL COURT OF THE STATE OF MAINE
SITTING AS THE LAW COURT

LAW COURT DOCKET NO. And-19-491

Adoption by Jessica M. et al.

ON APPEAL from the Androscoggin County Probate Court

REPLY BRIEF OF APPELLANT (DAD)

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INTRODUCTION

Without offering reasons to do so, Petitioners invite this Court to make a giant departure from existing law. Except in unitary child-protective-custody proceedings, Maine courts may not take judicial notice or admit findings made at a lower standard of proof than that applicable to the matter at bar. Petitioners would have this Court overturn that sound precedent, thereby eroding established burdens of proof in countless Maine case-types.

Here, if the court followed Petitioners' invitation to do so, the probate court utilized the improperly-admitted evidence to find that Dad was not a trustworthy witness. Because the court rejected most of Dad's testimony about important topics, the error is not harmless

ARGUMENT

First Assignment of Error

I. The court abused its discretion by considering Petitioners' Exhibit 20, which is purportedly a transcript of Dad's sentencing hearing. Dad disagrees with Petitioners' contentions that the probate court did not err, and that, even if it erred, such an error was harmless.

A. Petitioners have no applicable legal support for their argument that the probate court was "within its authority" to

consider Dad's purported sentencing transcript. Claiming that the singular case they cite authorized the probate court to take judicial notice of, or admit via collateral estoppel doctrine, Dad's purported sentencing transcript, Petitioners write in their brief:

> Even when findings from an earlier proceeding were subject to a less stringent burden of proof, judicial notice can be taken of the prior findings in a termination proceeding; but, the court 'must independently assess all facts presented and be confident to a clear and convincing standard that the evidence taken as a whole is sufficient' to meet the higher standard of proof. See generally In re Scott S., 2001 ME 114, ¶ 14, 775 1144, 1150.

Red Br. 21. These are the only sentences in Petitioners' 40-something-page brief that address the "insurmountable hurdle" to consideration of the sentencing transcript identified by Dad in his Blue Brief: "A prior finding by the preponderance of the standard cannot be given collateral estoppel effect in a proceeding governed by the clear and convincing standard." Blue Br. 24 (quotation marks and alterations omitted). Dad cited authority from this Court, the United States Supreme Court, and the American Law Institute; Petitioners, respectfully, cite one inapposite case.

In re Scott S. involved the "unified proceeding" of a child-protective custody case. 2001 ME 114, ¶ 12. Indeed, *In re Scott S.* "confirms a **unique** evidentiary treatment that is applicable **only** to child protective proceedings wherein a judge may consider and rely upon evidence submitted in earlier

hearings…because such proceedings are unitary in nature." *Cabral v. L'Heureux*, 2017 ME 50, ¶ 10 n. 3, 157 A.3d 795 (emphasis added). Here, the two cases Petitioners seek to treat as "unitary" span two separate court systems and accompanying rules of evidence and procedure, four different parties (five, if Mom is counted), two different judges, two different standards of proof, and wildly divergent litigation purposes. They are hardly unified or unitary. Yet, and without offering any reasons why this Court should change the law Maine courts have followed for nearly two decades to *retroactively* apply to Dad, Petitioners' legal argument boils down to an enticement to do just that. Dad will not argue both sides of the issue; Petitioners have waived the opportunity to argue against *stare decisis*. *See State v. Jandreau*, 2017 ME 44, ¶ 14, 157 A.3d 239 (Arguments "adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived.") The court abused its discretion to the extent it depended on either judicial notice or collateral estoppel.

Even if it hadn't, there are other problems[1] with the probate court's consideration of Exhibit 20 as evidence. Perhaps the tallest is the multi-

[1] For one, the exhibit was not authenticated per M.R.Evid. 901. This Court will not consider Petitioners' outside-the-record representations about a "stipulation" not "not placed on the record," *see* Red Br. 20 n. 33, not least because Petitioners "did not avail [themselves] of the procedure available in M.R.App.P. 5(d) to create a record" supporting such an assertion. *In re Child of Brooke B.*, 2020 ME 20, ¶ 3, n.2 – A.3d – (per curiam).

layered hearsay Petitioners must overcome. In one sentence, and without identifying the rule of evidence on which they rely, Petitioners hint that they *may* have been able to overcome one level of that hearsay in order to introduce Dad's "admissions" "*if* [Dad] reviewed such facts [as found by Judge Woodcock]…and did not dispute said facts." Red Br. 21-22 (emphasis added). Aside from the conditional "if" about which the court made no findings, *see* M.R.Evid. 104, Petitioners offer no cases to support the notion that that a judge's *findings* made at a *disputed* criminal sentencing hearing can be treated as statements of a party-opponent. Petitioners advance no arguments at all regarding how they might overcome the other levels of hearsay – *e.g.*, the statements of investigators, codefendants, informants, etc. upon which Judge Woodcock's findings are based.

B. Nor have Petitioners proven that the error was harmless. Turning to harm, Petitioners pepper their brief with statements that incorrectly imply that Dad bears a burden to prove he was prejudiced by the error. *See*, *e.g.*, Red Br. 22 ("speculative"; "fails to demonstrate any harm"), 23 ("father fails to demonstrate"; "father completely fails to indicate"; "there is simply no evidence"; "no indication"), 24 ("no indication"). This paradigm not so subtly attempts to shift Petitioners' burden to Dad, as it is *they* who have "the burden of persuading [this Court]

that it is highly probable that the error did not prejudice [Dad] or contribute to the result in the case." *In re Scott S.*, 2001 ME 114, ¶ 29. Their burden "is high" and "[a]ny doubt will be resolved in favor of [Dad]." *Ibid.*

The most troublesome part of Petitioners' use of the erroneously considered transcript is their repeated invitation for the court to use it to impeach Dad's testimony writ large. *See* Blue Br. 28-29; A. 82 ¶ 60 (inviting the court to find that "[the court] has serious reservations about the credibility of [Dad's] testimony in light of his outright denial of facts relating to his current prison sentence, and his minimization of his past substance abuse, criminal history….") In an attempt to alleviate this concern, Petitioners note that the probate court made no explicit finding about Dad's credibility. *See*, *e.g.*, Red Br. 24 ("there is no indication that the court discredited his testimony"). Respectfully, that the court "discredited" Dad's testimony is obvious from its findings, many of which directly contradict Dad's testimony. Here are just a few examples:

- Though Dad testified child had no medical concerns when he left Dad's care, 3Tr. 165, the court rejected that testimony, instead finding that "[child had an untreated skin condition, stomach and constipation issues, foot pain and vision issues" at the time. A. 7.

- Though Dad testified that he took child to the doctor "[w]hen he needed to go," 3Tr. 165, the court rejected that testimony, instead finding that, while he was with Dad, "received minimal medical treatment despite evidence of treatable health conditions." A. 7.
- Though Dad testified that he had no developmental concerns about child, 3Tr. 165, the court rejected that testimony, instead finding that child "had trouble with many simple life skills." A. 7.
- Though Dad testified that Petitioners had unreasonably hindered his communications with child, 3Tr. 136-37, 209-10, the court rejected that testimony, instead finding that Dad's "own conduct" had "largely removed" him from child's life, and that Dad "has failed to maintain any meaningful communication with [child] A. 9.[2]
- Though Dad testified that he would be released from prison in July 2020, 3Tr. 143-44, the court rejected that testimony, instead finding that Dad "will not be released until November 2020 at the earliest." A. 8.
- Though Dad testified that he had "sent more than a few letters" to child since 2017, 3Tr. 204, the court rejected that testimony, instead finding

[2] Petitioners' contention that "[t]here was no dispute" about the frequency of Dad's communications with child is not borne out by the record. Red Br. 29.

> that "Petitioner's [sic] received four letters from father " during that period. A. 8. This rejection of Dad's testimony must have contributed to the court's conclusion that Dad "has failed to maintain any meaningful communication with [child] A. 9.

This Court should have no difficulty seeing that the probate court rejected key portions of Dad's testimony; there is a reasonable probability that it did so because of the highly prejudicial contents of Exhibit 20.

Erroneously admitted "evidence" that undermines a key witness's credibility is particularly prone to causing harm. *State v. Hussein*, 2019 ME 74, ¶ 22, 208 A.3d 752 (where judgment depends on credibility, "exclusion of admissible evidence that had a tendency to undermine his credibility is prejudicial.") (alteration and quotation marks omitted). While Petitioners believe they have "significant" and "ample" other evidence to support the court's judgment, respectfully, even were that true – a point Dad disputes – all of that evidence is worth a hill of beans if it depends on a credibility determination affected by the court's error. In other words, so what if there is other evidence against Dad if the court might have instead credited Dad's contrary testimony but for the improperly admitted sentencing transcript?

Dad disagrees with Petitioners' argument that Exhibit 20 is either "not prejudicial" by its nature or somehow cumulative. Red Br. 19, 23.

Respectfully, an experienced federal judge's determination that Dad was moving an "extremely intense" amount of crack for violent, out-of-state gangs who were also conspiring to deal in illegal firearms is just the sort of "evidence" that, if admissible, would tend to incite some strong feelings against him. In fact, Petitioners' repeated attempts to tie Dad to the gang – featured again in the Red Brief (at 7, 23) – belies their arguments; why else do they keep referring to it, if not to paint Dad in a poor light? And, the notion that, at trial, Dad "admitted being involved" or "admitted his involvement" with the gang– as Petitioners claim, Red Br. 7, 23 – such that any reference to the gang in Exhibit 20 is cumulative, contorts Dad's testimony that Petitioners hold up in support of their claims.[3] This Court should have serious doubts that the probate court was not affected by Exhibit 20.

Second Assignment of Error

II. Due process required the court to visually assess Dad's credibility before rejecting his testimony. Petitioners again down-play the evidentiary disputes at trial in an effort to argue that this case "did

[3] Petitioners cite "3Tr. 186" for their statement that, "At trial, father admitted being involved with the gang." Red Br. 7. In the very next lines of his testimony, however, Dad clarified, "[W]hen you say it stems from my involvement, I had no involvement with them [*i.e.*, the gang]." 3Tr. 187. Petitioners' attempt to shoehorn this flimsy reference to the gang into their factual presentation underscores the value they evidently continue to see in the contents of Exhibit 20.

not turn on the resolution of a factual dispute based on one witness's credibility versus another's." Red Br. 27. If credibility was important, of course, due process would have required[4] visual assessments of Dad's credibility, as in the scores of cases Dad cited in the Blue Brief (at 31-32, n. 18). Dad's above bullet-pointed discussion of just some of the "factual dispute[s] based on one witness's credibility versus another's" central to the judgment also stands in relation to the second assignment of error. The existence of these disputes distinguishes our case from that cited in the Red Brief (at 27), where there was no such dispute. *J.E. v. Ind. Dep't of Child Servs.*, 45 N.E.3d 1243, 1248-49 (Ind. App. 2015).

Due process is a flexible concept, and the *Mathews* test is meant to weigh case-specific factors. Thus, the paradigm of the cases cited[5] by

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[4] Petitioners doubt the relevance to our case of many of the due process cases Dad cited in the Blue Brief because the private interest at stake in those cases related only to "welfare benefits or drivers' licenses." Red Br. 28 n. 36. To the contrary, as Petitioners' themselves note, "Proceedings to terminate that parental right are deserving of **more** elaborate procedural safeguards than are required for the determination of lesser civil entitlements." Red Br. 25 (alterations, quotation marks and citation omitted; emphasis added). That is Dad's point; if visual assessment was necessary in welfare and licensure cases, it was surely necessary when parental rights are at stake, all other *Mathews* factors considered. *Mathews v. Eldridge*, 424 U.S. 319 (1976).

[5] *In the Interest of F.L.S.*, 502 S.E.2d 256 (Ga. App. 1998), Red Br. 26 n. 35, a case decided **twenty-two years ago** presented a binary choice between in-person and telephonic participation, not appearance by video. So did *Orville v. Div. of Family Servs.*, 759 A.2d 595 (Del. 2000), a case decided **twenty years ago**, and *In the Interest of D.C.S.H.C.*, 733 N.W.2d 902 (N.D. 2007), decided **thirteen years ago**, present no discussion of appearance by video, Red Br. 26-27 n. 35, 27. Nor does *M.D. v. K.A.*, 921 N.W.2d 229 (Iowa 2018) present any discussion about the efficacy of appearance by video.

Petitioners, in which videoconferencing technology was not available to everyone at virtually no cost, supported by near ubiquitous internet availability and widespread videoconferencing fluency by members of every quilting club, dance class, and Moose Lodge represents history, not current day. Prisons and courts have no excuse to forgo such an easy technology, especially one key to a due process consideration prior courts have held is oftentimes of paramount importance to fairness – visual assessment of credibility. It is this Court that must set the lead in an era when due process will take on new forms; it should start by recognizing the importance of visual assessment of credibility and the ready availability of videoconferencing technologies.

Dad's argument is not that videoconferencing will always be required, even when credibility is central to the outcome. There will surely be times when circumstances weigh too heavily on the *Mathews* scale to justify it. But, when petitioners hale parents into court to sever fundamental rights, both those petitioners and the courts must expend *some* effort to ensure that the process they employ complies with due process. Neither Petitioners nor the probate court made any attempt to do so here, leaving it all on Dad. Remand is necessary for genuine attempts to reconvene a hearing at which Dad's credibility may be visually assessed. Maine probate courts cannot

remain islands unto themselves, unwilling to take easy steps to ensure fundamental fairness.

Third Assignment of Error

III. There is insufficient evidence to support the order of termination. Petitioners argue that there is "no factual support" for the notion that, by arranging to send child to live with grandmother; vetting Petitioners, and agreeing that they would appropriately care for child voluntarily agreeing to grant Petitioners general powers of attorney to undertake for child's well-being; and voluntarily consenting to a guardianship for child in their care, Dad has provided for child's needs, albeit indirectly. Red Br. 32 n. 38. Respectfully, these steps evince Dad's care for child – there's little more any incarcerated, single parent could do to care for his son.

So, when the probate court and Petitioners argue that it is not enough, the bottom line of their advocacy is that all incarcerated, single parents are unfit. This transgresses the bright line this Court established: "[A] parent's incarceration, standing alone, does not provide grounds for the termination of parental rights." *In re Cody T.*, 2009 ME 95, ¶ 28, 979 A.2d 81. Rather, "using the means available" – which must *primarily* include legal tools such as powers of attorney and guardianships – a parent must[6] "provide a

[6] Petitioners claim, "There is simply no support for [Dad's] contention [that incarcerated parents can take care of their children's needs by making such provision-of-

nurturing parental relationship." *Ibid* (quotation marks omitted). Dad has done that here, and a contrary holding not only improperly deprives Dad of his rights, but it erodes the legislatively-designed power-of-attorney and guardianship provisions.

Next, Petitioners hold up the evidence about just how well child is doing in the provision-of-care arrangement Dad has helped craft to argue that termination is in child's best interests. But, in their view, Dad is to get no credit for the results of the kin-based guardianship in which he has placed child. The fruits of that arrangement are all Petitioners have, other than Dad's "unfitness" – based, ironically, on his *lack* of provision of care, in their view – to support the best-interests prong. *See* Red Br. 37-40. The court's best-interests ruling unfairly penalizes him for his success in caring for child via the means available to him.

CONCLUSION

For the foregoing reasons, this Court should vacate the order of termination.

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care arrangements] in Maine jurisprudence." Red Br. 32. If the "means available" do not include such arrangements, what is left for incarcerated parents to do to "provide a nurturing parental relationship" other than send birthday and holiday cards and hope the correctional facilities allow a willing adult to bring the child to routinely visit the parent in prison? *In re Cody T.*, 2009 ME 95, ¶ 28. This Court, in *In re Alijah K.*, 2016 ME 137, ¶¶ 12 & 18, 147 A.3d 1159, wrote of the importance of "the availability of family members who were ready, willing, and able to care for the child while the father was incarcerated."

Respectfully submitted,

April 21, 2020

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CERTIFICATE OF SERVICE

Via U.S. Mail, I mailed two paper copies of this brief to the Clerk of this Court, Appellant's (Mom's) counsel, and Appellee's counsel at the addresses listed on the briefing schedule. I emailed a native PDF copy of the brief to lawcourt.clerk@courts.maine.gov and the addresses of the above-noted attorneys as listed in the Board of Bar Overseers' Attorney Directory.